



STATE OF WISCONSIN

Division of Hearings and Appeals

In the Matter of

Dane County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206667

Pursuant to petition filed October 28, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Dane County Department of Human Services (“the agency”) on behalf of Juneau County to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Thursday, December 8, 2022 at 09:15 AM via teleconference initiated from Madison, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Dane County Department of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343
By: Monica Johnson

Respondent:

██████████
██████████
████████████████████

Did Not Appear

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Juneau County has received FS benefits in Juneau County since December 2015 with occasional gaps in benefits.

2. Respondent was employed by [REDACTED] from November 30, 2021 through at least October 2022. She received her first paycheck on December 14, 2021 and was consistently paid every other week. During that time period she worked full-time (i.e., approximately 40 hours per week) and was paid \$12.25 per hour.
3. On June 2, 2022, Respondent completed a six month report form (SMRF) by telephone and reported that she had no job income. She telephonically signed that SMRF thereby certifying, under penalty of perjury, that the information she provided was accurate and complete and that she understood the penalties for giving false information.
4. On October 4, 2022, the agency mailed Respondent a letter stating that it believed she had committed an intentional program violation by failing to report employment with [REDACTED] and by falsely stating that it was her daughter who probably worked there when an agency worker specifically asked her if she employed there. The letter further advised Respondent that she could see the evidence that the agency was relying upon and could call Program Auditor Monica Johnson if she had any questions. As of the date of the hearing in this matter, Respondent had not contacted her to discuss or dispute the agency's finding.
5. On October 28, 2022, the agency prepared an Administrative Disqualification Hearing Notice alleging that Respondent "failed to report employment with [REDACTED] and later, when questioned by agency worker about the job, falsely stated it was her daughter who probably worked there and not her."
6. The agency sent the hearing notice to Respondent, who has a currently open benefit case, via certified mail, return receipt requested at the mailing address and residential address that she had most recently provided to the agency ([REDACTED] and [REDACTED]). The agency received signed receipts from the U.S. Postal Service that indicated both notices were received by someone at the respective addresses.
7. The hearing notice advised Respondent of the scheduled date and time for the hearing, indicated that the hearing would take place by telephone, instructed her to contact the undersigned administrative law judge (ALJ) prior to the hearing to provide a contact phone number, and provided the ALJ's direct phone line.
8. Respondent did not call the ALJ to provide a phone number.
9. At the scheduled time of the hearing, the ALJ called Respondent at the telephone number associated with her currently open benefit case and received an automated message indicating that the subscriber was not accepting calls.
10. The respondent failed to appear for the scheduled December 8, 2022 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation (IPV) of the FoodShare (FS) program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An individual who commits an IPV can be disqualified from participation in the FS program. The length of the disqualification period depends, in part, on the nature of the IPV. See 7 C.F.R. § 273.16(b). Generally, an individual will be disqualified for twelve months after committing her or his first IPV. See 7 C.F.R. § 273.16(b)(1)(i). The agency can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

An IPV can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1.

When an administrative disqualification hearing is scheduled and the respondent does not appear, the hearing shall nevertheless proceed if the respondent cannot be located or fails to appear without good cause. See 7 C.F.R. §273.16(e)(4). Here, the agency demonstrated that it sent a hearing notice to Respondent via certified mail, return receipt requested prior to the hearing and that the notice instructed Respondent to contact the undersigned administrative law judge (ALJ) with a telephone number at which Respondent would be available at the date and the time of the hearing. The respondent did not do so and the ALJ was unable to reach her for the hearing at the number associated with her agency case file. Because Respondent did not appear or claim a good cause reason for not attending the hearing, the Division of Hearings and Appeals must determine whether the respondent committed an IPV based solely on the evidence that the agency presented at hearing.

To establish, at hearing, that a FS recipient has committed an IPV, the petitioner must provide the following two separate elements through the presentation of clear and convincing evidence: (1) the recipient committed a program violation; and (2) the recipient intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that Respondent intentionally withheld or misrepresented facts by failing to report that she had been employed at [REDACTED] and receiving regular household income since November 2021 when she completed and filed a six month report form in June 2022. To support its case, the agency offered copies of Respondent's pay history that it received from [REDACTED]; CARES case comments that document telephone contacts between the agency and the Respondent including a telephone conversation during which Respondent denied working for [REDACTED] when specifically asked whether she worked there; the November 2022 six moth report form filed by Respondent on which she did not list her job at [REDACTED]; a copy of a letter sent to Respondent inviting her to call the agency regarding the intentional program violation finding; and the credible, relevant testimony of Program Auditor Johnson.

The respondent did not appear at the hearing to refute the agency's contention that her failure to report her employment constituted an intentional misrepresentation or omission of information. And, there is no evidence in the record to suggest that her failure was inadvertent. Unlike failing to report income increases or changes in employment between renewals, which can at times be chalked up to oversight, negligence, or forgetfulness, it is reasonable to presume, absent rebuttal, that an individual who both fails to report a job when completing a six month report form and who affirmatively denies employment while she is in fact working is purposefully concealing information to obtain benefits to which they are not entitled.

Based upon the record before me, I find that the agency has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent misrepresented, concealed or withheld facts by failing to report her employment and wages when completing a FS six month report form in June 2022; she thus committed an intentional program violation as that term is defined in 7 C.F.R. § 273.16(c)(1).
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause

for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

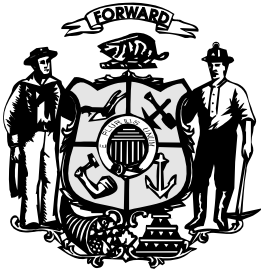
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 11th day of January, 2023



\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

c: Capital Consortium - email
Public Assistance Collection Section - email
Division of Medicaid Services - email
Monica Johnson - email



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The preceding decision was sent to the following parties on January 11, 2023.

Dane Cty. Dept. of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]